PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 0 4 2009
EAC 03 161 50113

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Marii Johnson

Z John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the director's decision. The Administrative Appeals Office (AAO) remanded the matter on procedural grounds. The director again denied the petition, and the AAO remanded the matter for a second time, finding the director's decision "deficient both procedurally and substantively." The director has denied the petition for a third time, and certified the decision to the AAO for review. The AAO will affirm the director's decision and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in business. The petitioner seeks employment as a co-publisher and co-editor of *Attawassul News*, an Arabic-language newspaper published in New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies as an alien of exceptional ability in business, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

In the March 13, 2009 notice of certification, the director allowed the petitioner 30 days in which to submit a response, pursuant to the regulation at 8 C.F.R. § 103.4(a)(2). Allowing an additional three days to account for service by mail, pursuant to 8 C.F.R. § 103.5a(b), the petitioner's response period elapsed on April 15, 2009. That date has passed, and the AAO has received no response from the petitioner. Accordingly, the AAO will render its decision based upon the record as it now stands.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue to be decided here is whether the petitioner qualifies for classification as an alien of exceptional ability in business. The regulation at 8 C.F.R. § 204.5(k)(3) states, in part:

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

In the following excerpts from a January 27, 2006 letter, counsel effectively conceded that the petitioner does not meet four of the six specified criteria listed in the above regulation. Counsel's assertions relating to the remaining two criteria are weak, as we shall discuss below. We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below. Qualifications possessed by all or most workers in a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows "exceptional" traits.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A)

Counsel stated:

> [The petitioner] has a high school degree and studied medicine for two years . . . [but] left his university studies after two years without a degree. . . . As [the petitioner's] studies do not directly relate to his area of exceptional ability, no official academic record is submitted.
>
> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

Counsel stated:

> [The petitioner] has never been employed by anyone in the field of newspaper publishing and therefore submits no letter from any current or past employer.
>
> [The petitioner] has co-founded and co-published a newspaper, the Attawassul News, which began production in 2001 [two years before the petition was filed in 2003].
>
> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

Counsel stated:

> [The petitioner] has no specific license or certification with respect to himself. He does, however, enclose the Business Certificate for Attawassul Editions which is the entity through which Attawassul News is published. Also enclosed is a filing receipt for a related entity, Association of the Moroccan Community of the U.S.A., Inc., which he co-founded to help facilitate the general growth of cultural exchange and discussion among Moroccans living in the U.S.

The "Business Certificate" is a notarized statement executed by the petitioner himself on March 29, 2001, declaring that he transacts business under the name "Attawassul Editions." Filling out such a statement on one's own behalf neither requires nor demonstrates exceptional ability in business; it simply declares that a business exists. The certificate is not even primary evidence that "Attawassul Editions" actually transacts business; it shows only that the petitioner claims to transact business. The petitioner's unsupported claims do not constitute evidence sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With respect to the Association of the Moroccan Community of the U.S.A., Inc., the petitioner has not established the extent, if any, to which the association has affected 'cultural exchange and discussion among Moroccans living in the United States. Further, the "filing receipt" for the

Association of the Moroccan Community of the U.S.A., Inc. is dated December 16, 2003, several months after the petition's May 1, 2003 filing date. Thus, even if simply filing articles of incorporation was indicative of exceptional ability (which it is not), this evidence would not establish such ability as of the filing date. An alien seeking employment-based immigrant classification must be eligible for that classification as of the petition's filing date, and cannot subsequently become eligible through later developments. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

For the above reasons, we find that the petitioner has not satisfied the regulatory provision relating to licensure and/or certification.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

Counsel stated that the petitioner "has earned a living for the last several years as a taxi driver. Revenue from Attawassul News comes from the placement of ads and generally does no more than cover the costs of printing and circulating the paper, if that." Since the petitioner has neither claimed nor established that he has received any money for his work at Attawassul News, he has not satisfied this regulatory provision.

> *Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E)

Counsel stated that the petitioner "is not a member of any relevant professional associations."

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

Counsel stated that the petitioner received a "Certificate of Appreciation . . . in recognition of Attawassul News' involvement in the Immigrant Workers Freedom Ride on October 4, 2003," as well as "a letter of recognition of [the petitioner's] work at Attawassul News form [sic] the Moroccan Consulate, dated August 14, 2002." The "Certificate of Appreciation," issued by the New York City Central Labor Council, expressed appreciation to the petitioner by name, but the record does not reveal why the council presented this certificate to the petitioner. The record, therefore, does not establish that this certificate was presented in recognition of achievements or significant contributions to the field. Also, the "Freedom Ride" took place several months after the petition was filed in May 2003, and therefore any recognition the petitioner received at that time cannot show that he was eligible as of the filing date pursuant to *Matter of Katigbak* at 49.[1]

[1] The AAO notes that the record contains items of correspondence which, like the certificate described above, relate to events that took place after the May 2003 filing date. *Katigbak* precludes their detailed consideration here.

With respect to the letter from the Moroccan Consulate General in New York, the record contains no certified translation of the document as required by 8 C.F.R. § 103.2(b)(3), even though the director, in the November 3, 2005 request for evidence, specifically stated: "If you submit a document in any language other tha[n] English it must be completely translated. The translation must certify that the translation is accurate and that he or she is competent to translate." The petitioner has not shown that the letter amounts to recognition for achievements and significant contributions to the field.

Pursuant to the above discussion, the petitioner has not persuasively shown that he meets any of the six criteria of exceptional ability listed at 8 C.F.R. § 204.5(k)(3)(ii).

Counsel asserted that the six listed regulatory criteria "do not readily apply to [the petitioner's] occupation. [The petitioner's] occupation as co-editor, co-publisher of an Arab-language newspaper does not involve use of specialized skill." According to counsel, what sets the petitioner apart is not his skill as an editor as such, but his "spirit of entrepreneurship." The assertion that editing a newspaper "does not involve use of specialized skill" is far from self-evident, and counsel provided no evidence to support this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, according to the Department of Labor's Occupational Information Network, the occupation of "editor" requires "Considerable Preparation," including "Several years of work-related experience" and, in most cases, a college degree. *See* http://online.onetcenter.org/link/summary/27-3041.00 (visited April 21, 2009; copy incorporated into record of proceeding).

The AAO takes notice that counsel did not claim that the regulatory standards do not readily apply to the petitioner's occupation, i.e., newspaper editor/publisher. Rather, counsel claimed that the petitioner stands out as an "entrepreneur," and that the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not apply do entrepreneurs. We do not find this argument persuasive. "Entrepreneur" is not a distinct occupation in its own right, any more than "employee" is a specific occupation. The petitioner is a newspaper publisher and editor, and as such it is proper to compare him to other newspaper publishers and editors.

Even if we were to accept that there is a distinct occupation called "entrepreneur" to which the regulatory criteria do not apply, 8 C.F.R. § 204.5(k)(3)(iii) requires the petitioner to submit comparable evidence to establish eligibility. It cannot suffice to argue that the petitioner relies on "intelligence, knowledge, skills and a spirit of entrepreneurship."

Furthermore, it is certainly possible to compare the accomplishments of one entrepreneur against those of other entrepreneurs. Some of the regulatory standards, such as compensation and length of experience, are absolute and easily documented through objective evidence.

Therefore, the petitioner has not shown that the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not apply to his occupation, nor has he supplied "comparable evidence" to establish exceptional ability in

his field.

In the certified decision issued on March 13, 2009, the director found that the petitioner had not submitted evidence to satisfy any of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The director also found that the petitioner had not persuasively established those criteria do not readily apply to the field of newspaper publishing. The record contains no rebuttal to the director's findings.

For reasons explained above, the AAO affirms the director's finding that the petitioner has not established that he qualifies as an alien of exceptional ability in business.

The second issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. The petitioner cannot qualify for the waiver if he does not also qualify for the underlying immigrant classification, but we will consider the waiver claim here in the interest of thoroughness.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used

here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, an alien cannot qualify for a waiver simply by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In its July 8, 2005 remand order, the AAO summarized the early stages of the proceeding and explained what further action would be necessary:

> The petitioner has asserted that his newspaper serves the national interest by serving as a voice of moderation within the Arab community in New York. The director, in discussing this newspaper, described the newspaper but did not explain why these attributes disqualified, or failed to qualify, the petitioner for a waiver. A discussion of "citations" appears to be more germane to the work of scientific researchers than to newspaper publishers.
>
> The petitioner contends that that moderate Arab voices must be heard, and this point is well taken, but it does not follow that publishing a moderate Arabic newspaper automatically qualifies the publisher/editor for a national interest waiver. The director should afford the petitioner the opportunity to demonstrate that his newspaper has shaped the debate about Arab-Western relations, and the role of Arabs in American society, beyond the local level. General arguments about the importance of the media or specialty publications cannot suffice, because Congress has established no blanket waiver for publishers or editors of such publications.

Following the AAO's remand order, the director issued a request for evidence on November 3, 2005, in which the director instructed the petitioner to establish that *Attawassul News* has influenced Arab-Western relations at a national level. The director observed that the petitioner appeared to be a full-time law student who has never held a paid position in the newspaper industry, and that further evidence would be necessary to establish the exact nature of the petitioner's intended future work.

In response, counsel stated that the petitioner "makes no claims to past influence; rather, Attawassul News is well-situated to make future contributions. . . . In the future, when economic circumstances allow, [the petitioner] plans to work full-time developing, publishing and editing Attawassul News." Rather than attempt to establish that the petitioner's work has had any past impact, counsel argued: "The plain text of the statutory language indicates no requirement of any specific past achievements. Any attempt through administrative rulemaking or administrative hearings to add such an additional requirement is *ultra vires*."

As a published precedent decision, *Matter of New York State Dept. of Transportation* is binding on all USCIS employees pursuant to 8 C.F.R. § 103.3(c). Counsel did not cite any judicial finding that overturned the finding in *Matter of New York State Dept. of Transportation* that an alien's past record of achievement is the best indicator of potential future benefit. Also, we note that Congress revisited the national interest waiver statute to add section 203(b)(2)(B)(ii) to the Act, in direct response to the precedent decision's implications for certain alien physicians. At that time, Congress did not add any amendment to withdraw or nullify the "alien's past record" language at page 219 of that same precedent decision. We can therefore presume that Congress did not object to that language. *See Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.")

When the director issued the certified denial on March 13, 2009, the director stated that the petitioner had not established that the petitioner's work with *Attawassul News* has had national scope or a history of demonstrable impact or influence in the field. The director noted that other publications geared toward Arab-Americans have substantially greater circulation and visibility. As noted above, counsel has not contested the finding that the petitioner's newspaper has had minimal impact so far; counsel's argument rests on the conjectural and speculative assertion that the paper will eventually grow in scope and influence as circumstances permit.

The AAO acknowledges that the director went outside the record when providing circulation data for other Arab-American publications. This information was provided simply to illustrate a point, however; it was not derogatory evidence that directly led to the denial of the petition. The AAO affirms the director's finding that the petitioner has not established eligibility for the national interest waiver.

Improving communication and understanding between the Arab community and others in the United States is certainly a laudable and worthwhile goal. At the same time, however, not every alien working toward that goal automatically qualifies for the special benefit of a national interest waiver. The petitioner's demonstrated impact to date has been minimal; it cannot suffice for the petitioner to assert that the petitioner is so talented and motivated that it is only a matter of time before he eventually becomes an important figure in his field.

On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will affirm the denial of the petition for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision of March 13, 2009 is affirmed. The petition is denied.